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ONTARIO

REPORT

on

SECTION 20 OF THE MORTGAGES ACT

ONTARIO LAW REFORM COMMISSION

The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. ALLAN LEAL, Q.C., LL.M., LL.D., *Chairman*

HONOURABLE JAMES C. McRUER, S.M., LL.D.

HONOURABLE RICHARD A. BELL, P.C., Q.C.

W. GIBSON GRAY, Q.C.

WILLIAM R. POOLE, Q.C.

Edward F. Ryan, Esq., LL.B., LL.M., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are located on the Sixteenth Floor at 18 King Street East, Toronto, Ontario, Canada.



ONTARIO LAW REFORM COMMISSION

PARLIAMENT BUILDINGS
TORONTO 2

TO THE HONOURABLE A. A. WISHART, Q.C.,
MINISTER OF JUSTICE AND
ATTORNEY GENERAL FOR ONTARIO.

Dear Mr. Attorney:

A submission has been made to the Commission that the provisions of section 20 of *The Mortgages Act*, R.S.O. 1960, c. 245 are deficient in a number of respects but particularly cause difficulties for the mortgagor who wishes to pay up his arrears and is met with a refusal by the mortgagee to state the amount of the arrears and to accept any such payment. The tender of arrears may be made either to forestall sale or the commencement of an action by the mortgagee, or as a condition precedent to an application to have an action dismissed or proceedings stayed once the action has begun.

Pursuant to section 2 (1) (a) of *The Ontario Law Reform Commission Act, 1964*, the Commission has considered the problems raised and now submits its report.

The provisions of section 20 read as follows:

“20.—(1) Notwithstanding any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

(a) at any time before sale under the mortgage or before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under him, the mortgagor may perform such covenant or pay the amount of moneys due under the

mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon he is relieved from the consequences of such default; or

- (b) in an action for enforcement of the rights of the mortgagee or of any person claiming through or under him, upon performance of such covenant or upon payment of the moneys due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and upon payment of the costs of the action, the mortgagor may apply to the court for relief, and
 - (i) if judgment has not been recovered the court shall dismiss the action, or
 - (ii) if judgment has been recovered but no sale or recovery of possession of the land or final foreclosure of the equity of redemption has taken place the court may stay proceedings in the action.
- (2) Notwithstanding subclause *ii* of clause *b* of subsection 1 where judgment has been recovered and recovery of possession of the land has taken place, the court may stay proceedings in the action upon the application of a person having a subsequent lien, charge or encumbrance, made under subsection 1 within ten days after service of notice of the judgment has been made upon him.
- (3) Where proceedings have been stayed under subclause *ii* of clause *b* of subsection 1 or under subsection 2 and default again occurs under the mortgage, the court upon application may remove the stay.
- (4) This section applies to mortgages existing on or made after the 2nd day of April, 1953."

In the factual situation envisaged by section 20 (1) (a) relief may be obtained by the mortgagor by paying the arrears and any expenses necessarily incurred by the mortgagee arising out of the mortgagor's default. There is nothing to compel the mortgagee to give a statement of the arrears and the mere fact that the mortgagor holds a copy of the mortgage instrument does not necessarily mean he is capable of calculating the exact amount of the arrears.

Accordingly the Commission recommends that section 20 be amended to enable the mortgagor to procure a statement of arrears from the mortgagee. It is suggested that section 20 of *The Mortgages Act* might be recast to read as follows:

“20.—(1) Notwithstanding any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

- (a) at any time before sale under the mortgage; or
- (b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under him,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon he is relieved from the consequences of such default.

- (2) The mortgagor may, by a notice in writing, require the mortgagee to furnish him with a statement in writing,
 - (a) of the amount of the principal or interest with respect to which the mortgagor is in default; or
 - (b) any expenses necessarily incurred by the mortgagee; or
 - (c) of the nature of the default in the non-observance of the covenant.
- (3) The mortgagee shall answer a notice given under subsection 2 within fifteen days after he receives it, and, if without reasonable excuse he fails so to do or his answer is incomplete or incorrect any rights which he may have to enforce the mortgage shall be suspended until he shall have complied with the provisions of subsection 2.”

Section 20 (1) (b) of *The Mortgages Act* involves the case where relief may be granted to a mortgagor where an action has already been commenced to enforce the rights of the mortgagee. Since these cases are dealt with in the Master’s Office, the matter was referred for comment to A. Foster Rodger, Esq., Q.C., the Senior Master. The Commission was informed subsequently that the matter had been considered by the Standing Subcommittee of the Rules Committee, and the Rules Committee itself, and that the question of the unavailability of a statement of arrears was only one of the problems created by the language of section 20 (1) (b).

The Rules Committee concluded that instead of the section requiring the mortgagor to pay or tender the arrears and costs prior to making an application to the court to have the action dismissed or stayed, as the case may be, it would be preferable to have the section amended to allow the mortgagor to apply to the court for relief conditional upon payment of the arrears and costs.

Once an action has been commenced there are distinct advantages in having these matters dealt with in an application to the court in the presence of the parties. The record will contain an endorsement of the settlement and this will ensure that the court is informed of the fact and details of the settlement and will preclude the mortgagee from proceeding subsequently under the same writ but based on a different default.

The existing provisions of section 20 (1) (b) require the mortgagor to pay the arrears and costs as a condition precedent to applying for relief under the section. Since the Rules Committee has recommended that the granting of relief be made conditional upon payment of the arrears and costs, they also recommend that the application of the mortgagor must be accompanied by payment into court of the sum of \$100 to the credit of the action as security for costs.

The Rules Committee has recommended that section 20 (1) (b) be amended to read as follows:

“in an action for enforcement of the rights of the mortgagee or of any person claiming through or under him, the mortgagor, upon payment into court of the sum of \$100 to the credit of the action as security for costs, may apply to the court and, conditional upon performance of such covenant or upon payment of the money due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and upon payment of the costs of the action, the court

- (a) shall dismiss the action if judgment has ^{NOT} been recovered,
or
- (b) may stay proceedings in the action, if judgment has been recovered, but no sale or recovery of possession of the land or final foreclosure of the equity of redemption has taken place.”

The Commission concurs in these recommendations except that the Honourable J. C. McRuer would delete the requirement that the mortgagor must pay into court the sum of \$100 as security for costs before he may avail himself of the right to apply to the court for relief under the proposed section. He emphasizes that before effective relief can be granted by the court the covenant must be performed or the money due under the mortgage must be paid together with the costs of the action. His view is that the requirement that \$100 be paid into court as a security for costs is in the nature of a penalty to deter mortgagors from availing themselves of the benefits provided by the section. He also observes that in most cases mortgagees will have ample security for costs in the equity of redemption. His view is that the ordinary rules as to when security for costs should be required should apply to applications under the proposed section.

In view of the amendments which the Commission has recommended to section 20 (1) (a), it also recommends that section 20 (1) (b) be renumbered section 20A (1) and that the remaining subsections (2) and (3) of section 20 appear as part of the new section 20A.

The Standing Subcommittee of the Rules Committee has taken the position that if section 20 is amended as proposed in this report, then a new rule should be added as Rule 491a reading as follows:

“491a. Upon an application under section 20 of *The Mortgages Act*, the court may require the mortgagee to prove the moneys due under the mortgage, exclusive of the money not payable by reason merely of lapse of time and may tax the costs of the action.”

In addition it is recommended by the Standing Subcommittee that an additional clause be added to “Warning to Defendant” in Form 8 as follows:

“NOTE — In a mortgage action add: and take notice that the defendant may be entitled to apply to the court for relief under section 20 of *The Mortgages Act*.”

The Commission concurs in both these recommendations and wishes to take this opportunity of thanking the Rules Committee and the Senior Master for their helpful co-operation.

SUMMARY OF RECOMMENDATIONS

The Commission recommends:

1. That section 20 of *The Mortgages Act*, R.S.O. 1960, c. 245 be amended to read as follows:

“20.—(1) Notwithstanding any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

- (a) at any time before sale under the mortgage, or
- (b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under him,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon he is relieved from the consequences of such default.

- (2) The mortgagor may, by a notice in writing, require the mortgagee to furnish him with a statement in writing,
- (a) of the amount of the principal or interest with respect to which the mortgagor is in default; or
 - (b) any expenses necessarily incurred by the mortgagee; or
 - (c) of the nature of the default in the non-observance of the covenant.

(3) The mortgagee shall answer a notice given under subsection 2 within fifteen days after he receives it, and, if without reasonable excuse he fails so to do or his answer is incomplete or incorrect any rights which he may have to enforce the mortgage shall be suspended until he shall have complied with the provisions of subsection 2."

2. That a new section 20A be added to *The Mortgages Act*, R.S.O. 1960, c. 245 reading as follows:

"20A.—(1) Notwithstanding any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable, in an action for enforcement of the rights of the mortgagee or of any person claiming through or under him, the mortgagor, upon payment into court of the sum of \$100 to the credit of the action as security for costs, may apply to the court and, conditional upon performance of such covenant or upon payment of the money due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and upon payment of the costs of the action, the court

- (a) shall dismiss the action if judgment has ^{NOT} been recovered, or
- (b) may stay proceedings in the action, if judgment has been recovered, but no sale or recovery of possession of the land or final foreclosure of the equity of redemption has taken place.

- (2) Notwithstanding clause *b* of subsection 1 where judgment has been recovered and recovery of possession of the land has taken place, the court may stay proceedings in the action upon the application of a person having a subsequent lien, charge or encumbrance, made under subsection 1 within ten days after service of notice of the judgment has been made upon him.

(3) Where proceedings have been stayed under clause *b* of subsection 1 or under subsection 2 and default again occurs under the mortgage, the court upon application may remove the stay.”

3. That a new rule be added to the Rules of Practice of the Supreme Court of Ontario reading as follows:

“491a. Upon an application under section 20A of *The Mortgages Act*, the court may require the mortgagee to prove the moneys due under the mortgage, exclusive of the money not payable by reason merely of lapse of time and may tax the costs of the action.”

4. That an additional clause be added to “Warning to Defendant” in Form 8 reading as follows:

“NOTE — In a mortgage action add: and take notice that the defendant may be entitled to apply to the court under section 20A of *The Mortgages Act* to be relieved of the consequences of his prior default.”

All of which is respectfully submitted,

H. ALLAN LEAL,
Chairman.

JAMES C. McRUER,
Commissioner.

RICHARD A. BELL,
Commissioner.

W. GIBSON GRAY,
Commissioner.

WILLIAM R. POOLE,
Commissioner.

March 12, 1970.

Date Due





